STATE OF MICHIGAN

COURT OF APPEALS

DIETRICH FAMILY IRREVOCABLE TRUST,

Plaintiff-Appellant,

v

S. E. MICHIGAN LAW ASSOCIATES, P.L.L.C., DAVID S. DELBOCCIO, and CHRISTOPHER S. C. WEBBER,

Defendants-Appellees.

UNPUBLISHED
February 14, 2006

No. 261238
Wayne Circuit Court
LC No. 04-422513-CK

Before: Murray, P.J., and Cavanagh, and Saad, JJ.

PER CURIAM.

Plaintiff appeals by leave granted an order granting summary disposition in favor of defendants in this breach of contract action. We reverse.

I. Background

This breach of contract case arises out of defendants' lease of office space from plaintiff. The office is located at 718 Notre Dame in Grosse Pointe. Evidently, there has been a written lease agreement between plaintiff and defendant law firm for several years. Also, it appears that defendant law firm previously provided legal services to plaintiff and/or plaintiff's agent, Edgar Dietrich. Defendants claimed that, in late 2003, Dietrich began constructively evicting them from the premises by confiscating financial records and bank books, intercepting mail and telephone calls, denying purchased office supplies and restricting access to common areas of the building.

In order to resolve the parties' disputes, the parties entered into a new lease on February 3, 2004. The lease was for a term of one year and required payment of $42,000 in monthly installments of $3,500. The lease contained a default provision requiring that, on its failure to pay rent, the lessee "shall vacate the premises and, in the event it fails to do so, may be barred from reentry." The lessee would remain liable for the payments remaining on the lease or for any rental deficiency from re-letting the premises. The lease also provided that any required notice be in writing and properly served or mailed to the other party. Defendant law firm is the "Lessee" under the lease; however, the lease states that it "shall be personally guaranteed by the members of the Lessee." Defendants Webber and DelBoccio, who were evidently members of defendant law firm during the term of the lease, signed the lease on behalf of defendant law firm.

According to defendants, there was an understanding that defendants Webber and DelBoccio were "acting exclusively as agents" of defendant law firm and that the rental amounts were to be offset by $9,279.70 in attorney's fees that plaintiff and Dietrich owed to defendant law firm.

On February 16, 2004, defendants and their staff were prohibited from entering the premises, and their files and personal belongings were confiscated. According to plaintiff, the lock-out resulted because defendants defaulted on the lease by failing to make rental payments. Defendant law firm, through defendants Webber and DelBoccio, filed suit in municipal court, landlord/tenant division, against plaintiff and Dietrich alleging that in contravention of the lease plaintiff locked them out of their offices without providing notice and seeking access to their offices. The municipal court entered a temporary restraining order against eviction, providing defendants with full access to the Notre Dame premises, and restraining plaintiff and Dietrich from interfering with defendants' quiet enjoyment of the property.

Apparently, defendants were permitted to re-enter the office building on February 17, 2004. According to defendants, their office had been ransacked, and their files and personal belongings were being held in the office of plaintiff's attorney, David Olson. Defendants asserted that, ultimately, they received most, but not all, of their belongings back. It also appears that, after reentry, defendants arranged to obtain a different office space and vacated the Notre Dame premises around February 21, 2004. According to defendants, immediately after they vacated the premises, plaintiff sold it to a third party. Plaintiff contended that it attempted to re-let the space, but was forced to sell the premises at a loss to meet its mortgage and other financial obligations.

On June 2, 2004, the municipal court entered a default judgment against plaintiff and Dietrich and awarded $3,000 in damages to defendants. However, on October 21, 2004, the June 2004 order was vacated by a stipulated order of dismissal, and the matter was dismissed with prejudice and without costs.

On July 22, 2004, plaintiff, through attorney Olson, filed the instant lawsuit in circuit court alleging a breach of contract. Plaintiff claimed, in part, that defendants breached the February 2004 lease by failing to pay any of the rental payments and were responsible for the full amount of the lease, $42,000. Defendants filed a motion for summary disposition contending that the amount in controversy was below the circuit court's jurisdictional threshold because plaintiff sold the premises immediately after defendants vacated the building, that res judicata applied because they had filed a prior suit in municipal court for breach of the instant contract and received a final judgment, that defendants Webber and DelBoccio were not personally liable under the lease because they were agents acting for a disclosed principal, and that the February 2004 eviction was accomplished without the notice required under the lease. Defendants also moved to disqualify attorney Olson as plaintiff's counsel for his involvement in confiscating defendants' property from the premises. Defendants further moved for costs associated with having to defend against plaintiff's frivolous action.

After hearing arguments from the parties, the trial court concluded that the action did not satisfy its jurisdictional threshold, that defendants Webber and DelBoccio were not personally liable to plaintiff under the February 2004 lease and that summary disposition was proper based on plaintiff's failure to provide notice or pursue an eviction action, and based on the existence of an "apparent" set-off agreement between the parties whereby defendants' rental payments would

be reduced by the legal fees plaintiff owed. The trial court then granted the motion to disqualify Olson as plaintiff's counsel after concluding that Olson may be a "material witness" in this case, and awarded defendants $3,000 in costs.

On December 21, 2004, the trial court entered a written order stating that summary disposition was granted "pursuant to res judicata, failure to state a claim upon which relief can be granted and lack of jurisdiction . . . ." The order also "excluded" Olson as counsel for plaintiff and required plaintiff to pay $3,000 to defendants. While plaintiff's application for leave to file a delayed appeal was pending in this Court, plaintiff filed an objection to the award of attorney fees as sanctions or costs to a pro se litigant. After a hearing on the matter, the trial court entered an amended order again granting summary disposition in favor of defendants, but omitting language regarding the disqualification of plaintiff's counsel and the imposition of sanctions against plaintiff.

II. Analysis

A. Subject-Matter Jurisdiction

On appeal, plaintiff claims that summary disposition in favor of defendants was improper because the trial court had subject-matter jurisdiction over this action. We agree.

Jurisdictional questions presented by a motion for summary disposition under MCR 2.116(C)(4) based on the lack of subject-matter jurisdiction are questions of law that we review de novo. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205-206; 631 NW2d 733 (2001). In reviewing a motion under MCR 2.116(C)(4), we must determine "whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the affidavits and other proofs show there was no genuine issue of material fact." *Jones v Slick*, 242 Mich App 715, 718; 619 NW2d 733 (2000).

Circuit courts are courts of general jurisdiction, with original jurisdiction to hear and decide all civil claims and remedies, "except where exclusive jurisdiction is given in the constitution or by statute to some other court . . . ." MCL 600.605; *Manning v Amerman*, 229 Mich App 608, 610-611; 582 NW2d 539 (1998). MCL 600.8301(1) provides: "The district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00." Pursuant to MCL 730.522, a municipal court has concurrent jurisdiction in all civil actions where the amount in controversy does not exceed "$1,500.00, unless the city in which the municipal court is located increases the jurisdictional amount for that municipal court to $3,000.00 by resolution of the city's legislative body."

In its complaint, plaintiff alleged breach of contract damages of $60,000, including $18,000 from a prior lease, and $42,000 from the February 2004 lease. Plaintiff later asserted that the February 2004 lease was the operable lease and that defendants owed plaintiff $42,000 upon its breach. Therefore, the damages alleged by plaintiff fell within the jurisdiction of the circuit court. Although defendants argued that if plaintiff suffered any damages, they were minimal because plaintiff sold the premises to another buyer immediately after defendants vacated the building, subject-matter jurisdiction depends on the allegations pleaded, not on the actual facts or the truth or falsity of the claim. *Trost v Buckstop Lure Co, Inc*, 249 Mich App 580, 587-588; 644 NW2d 54 (2002). There is nothing in the pleadings that precludes the circuit

court from exercising jurisdiction over this cause of action. The claim was for breach of contract, and the alleged damages exceeded $25,000. The circuit court is the court of general jurisdiction in Michigan, and its jurisdiction was not explicitly preempted by the jurisdiction of another court. See *Manning*, *supra* at 610-611. Although the trial court may ultimately be correct in concluding that plaintiff's damages fall below the court's jurisdictional threshold, such a ruling was premature at this juncture of the proceedings. Accordingly, to the extent that the trial court granted defendants' motion for summary disposition based on lack of subject-matter jurisdiction, that ruling was erroneous.[1]

B. Res Judicata

Plaintiff also claims that summary disposition in favor of defendants was improper because the doctrine of res judicata cannot act to bar its current claim seeking damages for defendants' failure to pay rent under a lease agreement. We agree.

We review de novo the question whether res judicata bars a subsequent action. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). In addition, we review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) to determine whether the movant was entitled to judgment as a matter of law. *Rinas v Mercer*, 259 Mich App 63, 67; 672 NW2d 542 (2003).[2] When considering a motion under MCR 2.116(C)(7), we may consider the pleadings, affidavits and other documentary evidence in the light most favorable to the nonmoving party to determine whether the claim is precluded. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998).

The rationale for the doctrine of res judicata is to prevent multiple suits litigating the same cause of action. *Adair*, *supra* at 121. "The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Id*. Michigan courts have taken a broad approach to the doctrine of res judicata. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). They have held that it bars not only claims previously litigated, but also every claim arising out of the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Id*.

In the first action, defendants sought access to the leased premises. The municipal court entered a default judgment against plaintiff and a declaratory judgment imposing damages in the

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[1] We also note that, contrary to its ultimate conclusion, the trial court stated at the summary disposition hearing that "[t]he jurisdictional amount appears to be in dispute." Where there is a genuine issue of material fact, summary disposition under MCR 2.116(C)(4) is improper. See *Jones*, *supra* at 718.

[2] Defendants brought this part of the motion under MCR 2.116(C)(6), which provides for dismissal where another action involving the same parties and the same claim has been initiated. However, at the time of the summary disposition hearing, the prior action had been resolved. Therefore, the proper ground for summary disposition would have been under MCR 2.116(C)(7), which provides for dismissal because of a prior judgment.

amount of $3,000 against plaintiff. Subsequently, the municipal court entered a consent judgment, vacating the award of damages. The record indicates that the prior action involved the same parties, was decided on the merits and resulted in a final judgment. See *Staple v Staple*, 241 Mich App 562, 572; 616 NW2d 219 (2000) (holding that a default judgment or a consent judgment constitutes a judgment on the merits to which res judicata applies). At issue is the third requirement for res judicata, which is whether the matter in the second case was, or could have been, resolved in the first.

The issue of outstanding rental payments was not actually litigated in the first action, and nor could it have been. As previously mentioned, the municipal court at issue had, at most, a jurisdictional limit of $3,000. See MCL 730.522. MCL 600.5739 allows for joinder of claims and counterclaims for money judgment for "damages attributable to wrongful entry, detainer or possession, for breach of the lease or contract under which the premises were held or for waste or malicious destruction to the premises," but such "[a] claim or counterclaim for money judgment shall not exceed the amount in controversy which otherwise limits the jurisdiction of the court." See also MCR 4.201(G)(2). Plaintiff's allegations of damages for breach of the lease agreement exceeded the municipal court's jurisdictional limit. A prior judgment cannot form the basis of a res judicata decision if it was not entered by a court of competent jurisdiction. *Reid v Gooden*, 282 Mich 495, 498; 276 NW 530 (1937). Because plaintiff's claim for breach of contract damages could not have been resolved in the prior action based on the amount in controversy, we conclude that the trial court erred when it applied the doctrine of res judicata to preclude the instant suit.

C. Personal Liability

We also agree with plaintiff's argument that summary disposition in favor of defendants was improper because defendants Webber and DelBoccio were personal guarantors under the lease, and because there were genuine issues of material fact.

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings alone, whereas a motion under MCR 2.116(C)(10) reviews evidence beyond the pleadings to test the factual support for a claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277-278; 681 NW2d 342 (2004). Because the trial court considered evidence beyond the pleadings, summary disposition under MCR 2.116(C)(8) was inappropriate. Therefore, we will review the trial court's grant of summary disposition under MCR 2.116(C)(10). See *Shirilla v Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995) ("An order granting summary disposition under the wrong court rule may be reviewed under the correct rule."). Review is limited to evidence before the trial court at the time the motion was decided. *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

We review de novo a trial court's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is appropriate under MCR 2.116(C)(10) if the affidavits, pleadings, depositions, admissions and other documentary evidence, when viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *Corley*, *supra* at 278. Additionally, questions concerning the interpretation of contracts are questions of law that we

review de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

In this case, defendants Webber and DelBoccio sought summary disposition of the claims against them, asserting that they could not be held personally liable under the February 2004 lease since they signed the lease as agents for a disclosed principal. An agent acting for a disclosed principal is not personally liable under the agreement unless he agreed to become liable. *Riddle v Lacey & Jones*, 135 Mich App 241, 246-247; 351 NW2d 916 (1984); *National Trout Festival, Inc v Cannon*, 32 Mich App 517, 521; 189 NW2d 69 (1971). The February 2004 lease names defendant law firm as the "Lessee." The lease specifically states that "[t]he lease shall be personally guaranteed by the members of the Lessee." Defendants Webber and DelBoccio do not dispute that they were members of defendant law firm at the time that the lease was executed. Therefore, under the explicit terms of the lease, defendants Webber and DelBoccio agreed to become liable.

Defendants' contention that there were "overt discussions" between the parties where it was determined that no personal liability would be imposed on the parties is irrelevant. The lease explicitly states, "This agreement, together with the security and option agreement entered into between the Lessor and the Lessee, contains the entire agreement of the parties with respect to its subject matter." Parol evidence of contract negotiations or contemporaneous agreements that are contrary to the written contract is inadmissible to modify the terms of a clear and unambiguous contract. *Blackburne & Brown Mortg Co v Ziomek*, 264 Mich App 615, 627; 692 NW2d 388 (2004). As noted, the contract specifically states that the members of defendant law firm personally guarantee the lease. The contract between the parties is plain and unambiguous and should be construed according to the language of the contract. We conclude that, as members of defendant law firm, defendants Webber and DelBoccio may be held personally liable under the plain language of the lease. Therefore, the trial court erred in granting summary disposition to defendants Webber and DelBoccio.[3]

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[3] Furthermore, the trial court granted summary disposition in favor of defendants, in part, based on its findings that plaintiff failed to provide the requisite notice of a default before barring defendants from the premises and that there was "apparently" a set-off arrangement concerning the rental payments by defendants in relation to the legal fees plaintiff owed. It is well-settled law that "a court speaks through its written orders." *In re Gazella*, 264 Mich App 668, 677; 692 NW2d 708 (2005). Accordingly, our jurisdiction is confined to written orders and judgments. *Lown v JJ Eaton Place*, 235 Mich App 721, 725-726; 598 NW2d 633 (1999). In this case, neither of the trial court's written orders of December 2004 or May 2005, indicates that the grant of summary disposition was based on these findings. Rather, the December 2004 order states that summary disposition was granted "pursuant to res judicata, failure to state a claim upon which relief can be granted and lack of jurisdiction . . . ." The May 2005 order merely states that defendants' motion for summary disposition is granted. Therefore, the lack of notice and the existence of a set-off agreement are not proper issues for our review. Even if these issues were reviewable, the record indicates that the evidentiary support for the trial court's findings was lacking. Regarding the notice issue, the notice provision in the lease is a general provision stating that "[a]ny notices required under this lease shall be in writing . . . ." However, the

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D. Attorney Disqualification

Plaintiff argues that attorney Olson should not have been disqualified as its counsel because this case is merely a collection matter for rental payments owed. After review of the record, we conclude that this issue has become moot. Following its initial order granting summary disposition in favor of defendants, the trial court entered a subsequent order, again granting defendants' motion for summary disposition, but omitting the disqualification of attorney Olson and the award of sanctions. The trial court acted within its authority in amending the order before this Court granted leave to appeal. MCR 7.208(A). Additionally, MCR 7.208(C) governs corrections of defects and provides that, until the record is filed in this Court, a trial court has jurisdiction "to correct any part of the record to be transmitted to the Court of Appeals, but only after notice to the parties and an opportunity for a hearing on the proposed correction." At the time the subsequent order was entered, the record had not yet been filed with this Court. Because the trial court's amended judgment omits the disqualification ruling, we conclude that the issue of disqualification has become moot. Further, the issue of disqualification is also moot because the reversal of an order disqualifying Olson would have no practical effect on this action since plaintiff has retained new counsel and asserts that Olson has retired from the practice of law due to illness. See *Ryan v Ryan*, 260 Mich App 315, 330; 677 NW2d 899 (2004) (stating that, in general, this Court is not required to reach moot issues or declare legal principles having no practical effect on a case).

E. Sanctions

Plaintiff further argues that the trial court erred in imposing sanctions in the amount of $3,000 against it. Again, we conclude that this issue has become moot because the trial court entered an amended order granting summary disposition to defendants, but omitting the previously ordered sanctions.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Henry William Saad

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default provision does not contain a notice requirement. Therefore, the plain language of the lease does not require plaintiff to give notice to defendants before barring them from the property. Regarding the alleged set-off agreement, defendants' unsigned letter does not indicate that the parties agreed to a set-off arrangement nor can it be used as evidence to modify the terms of a clear and unambiguous contract. See *Ziomek*, *supra* at 627. Therefore, if the grant of summary disposition was based on these facts, it was improper.